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STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT
(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

ANTONIO CRAIG, Minor, by his
Next Friend and Co-Conservator,
KIMBERLY CRAIG,

Plaintiff-Appellee,

vs.

OAKWOOD HOSPITAL
a Michigan Corporation

Defendant-Appellant,
and

ELIAS G. GENNAOUI, M.D. and
ASSOCIATED PHYSICIANS, P.C.,

Defendants-Appellants,
and

HENRY FORD HOSPITAL
d/b/a HENRY FORD HEALTH SYSTEMS, and
AJIT KITTUR, M.D.

Defendants.
_____/

S.C. Nos.: 121405; 121407-09; 121419

COA Nos.: 206642; 206859; 206951
Cooper, P.J. and Sawyer and Owens JJ.
Wayne County Circuit Court
L.C. No.: 94-410338- NH
Hon. Carole Youngblood

REPLY BRIEF OF DEFENDANTS-APPELLANTS ELIAS G. GENNAOUI, M.D. AND ASSOCIATED PHYSICIANS, P.C. TO BRIEF ON APPEAL BY PLAINTIFF-APPELLEE

ORAL ARGUMENT REQUESTED

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STATEMENT OF FACTS

The Statement of Facts previously tendered by these Defendants-Appellants in their Brief filed with this Court on December 23, 2003 will suffice for the within Reply Brief.

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ARGUMENT

THE QUESTION OF PRESERVATION OF THE ERROR

The factual and legal errors made by Plaintiffs in their Brief on Appeal require a response from these Defendants.

Counsel for Defendants-Appellants Gennaoui and Associated Physicians does not wish to add to the avalanche of briefing which has already immobilized the Clerk of the Court. However, Counsel's duties require clearly delineated replies to several points made by Plaintiff in Plaintiff's recently filed Brief.

Plaintiff contends that Defendants Gennaoui and Associated Physicians, through trial counsel, never requested a Davis-Frye hearing. It is certainly true that trial counsel for Oakwood Hospital was the "point person" making the Oral Arguments on the necessity for a Davis-Frye hearing. (33a-44a). But Plaintiff's hypertechnical approach to issues preservation - - never advanced in the trial court or the Court of Appeals or on Application before this Court - - overlooks the realities of trial court and appellate litigation.

During the course of this case, the parties would frequently allow one defense attorney or the other to articulate defense objections because, after all, this was a complicated case and issues pertaining to Plaintiff's experts, both Dr. Gatewood and Dr. Gabriel, were inherently parallel for both sets of Defendants. Dr. Gabriel was central both to the claim against Defendant Oakwood Hospital as it was against Defendants Gennaoui

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and Associated Physicians, P.C.

Because the error of allowing completely incompetent testimony by Ronald Gabriel, M.D., affected not only Oakwood Hospital but all the other Defendants, the objection by Defendant Oakwood Hospital, coupled with the definitive ruling on the issue by the trial court, was sufficient to preserve it for all Defendants "because an issue is not waived by a party's failure to make futile objections." Miller v Hensley, 244 Mich App 528, 532 fn 2, 624 NW2d 582 (2001) (a party's failure to object to a witness's testimony did not leave the issue unpreserved where such an objection would have asked the court to revisit an identical issue it had already decided). See, e.g., MRE 103(a) ("[o]nce the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal"); MCR 2.517(A)(7) ("no exception need be taken to a finding or decision [of the trial court]").

To punctuate that very point, at 43a of our Appendix, Co-Defendant Dr. Kittur, who is also represented by Mr. Watters who acted on behalf of Dr. Kittur, Associated Physicians, P.C. and Elias Gennaoui was referenced by Mr. Silverman on behalf of Plaintiff. Referring to Dr. Kittur's deposition, at page 295 of that testimony, Plaintiff's counsel is in no position now to contend that the issue was carefully delineated away from Defendants Associated Physicians and Gennaoui to Oakwood Hospital, only, since the other Defendants' testimony was being

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referred to in order to purportedly support the testimony of Dr. Gabriel (43a).

Plaintiff's counsel does not advert to the fact, of course, that all post-trial motions and briefs in the case filed by Defendants-Appellants Elias Gennaoui and Associated Physicians, P.C., specifically incorporated all appellate arguments which had been made by Oakwood Hospital, of course. This was done in no uncertain terms in our Judgment Notwithstanding the Verdict Motion, our New Trial Motion and, specifically, in the arguments on appeal.

Furthermore, Defendants Associated Physicians, P.C. and Elias Gennaoui stated on page 70 of the Brief filed in the Michigan Court of Appeals on April 1, 1999 the following:

> "To the extent not inconsistent with the arguments of this Brief, Defendants-Appellants Gennaoui and Associated Physicians, P.C., adopt by reference all of the appellate arguments **made at any time** by Defendants Oakwood Hospital and/or Henry Ford Hospital.
>
> For example, the excellent argument developed by Henry Ford Hospital about the total lack of scientific substance in the claims of retardation and the refusal of the Trial Court to conduct or hold a "Davis-Frye" hearing is incorporated herewith. See Checchio v Frank Ford Hospital, 717 A2d 1058 (Penn 1998). A reversal should therefore enter forthwith."

In the Michigan Court of Appeals Brief itself, there was a direct statement on behalf of Defendants-Appellants which stated:

> "Finally, Kuhmo Tire Company v Carmichael, ___ US __ (March 23, 1999) and Daubert v Merrell Dow Pharmacy, 509 US 579 (1993) militates against the ipse dixit of any experts analysis. Above all else MRE 702 should be based on whether the medical terminology and method is reliable. Kuhmo Tire, supra.

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> For the sake of brevity, all other arguments advanced by Co-Defendants on appeal are herewith incorporated by reference, except at to the extent that they are inconsistent with the text of the instant brief, which shall always control."

At no time during that appeal or during the Application to the Michigan Supreme Court did Plaintiff take the position that there was a "waiver" by these Defendants. Nor does Plaintiff's counsel explain how it would be possible for Oakwood Hospital to demonstrate the complete inadvisability of allowing Ronald Gabriel, M.D. to testify on his bizarre theories in a fashion which would prejudice Oakwood Hospital, but not Defendants Gennaoui and Associated Physicians. The very idea is patently absurd.

Plaintiff's contention is fatuous on its face. The position taken by Plaintiff is absurd because it has long been clear in Michigan law that, in order for an issue to be properly preserved for appellate review, it merely needs to have been raised in and addressed by the trial court with some finality. See, for example, Detroit Free Press, Inc. v Family Independence Agency, 258 Mich App 544, 672 NW2d 513 (2003) ("[an issue is preserved for appeal if it is raised before and addressed by the trial court"). See also People v Taylor, 387 Mich 209, 221, 195 NW2d 856 (1972) ("[w]here . . . the basis for review has already been brought to the attention of the trial judge and he has ruled on it adversely . . . , it would be a patent waste of time and a useless act to require the defendant to bring the matter to the attention of the trial court again").

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Without question, Judge Youngblood's clear delineation on the Davis-Frye hearing (outlined by our Appendix at 33a-44a) contains an irrefutably clear discussion of the necessity for the Davis-Frye hearing by counsel for Oakwood Hospital, with Mr. Watters (with an identical issue) standing by. When Judge Youngblood passed on the issue, he did so adversely to all the Defendants involved with Dr. Gabriel as expert. It is not necessary that the party who claims error on appeal be the party who raised the issue if it is plain that the issue was raised in the case and passed upon by the trial court. See, for example, Shields v Shell Oil Co., 463 Mich 940, 621 NW2d 215 (2000) (granting relief to one party on issue raised in the trial court by a different party) and Shields v Shell Oil Co., 237 Mich App 682, 604 NW2d 719 (2000) (citing MCR 2.517(A)(7) and recognizing that the appellant could raise the statute of limitations question on appeal, even though it had been raised below by another party, because it had been decided adversely to the appellant by the trial court), rev'd on other grounds by Shields, supra 463 Mich 940.

Put another way, because Judge Youngblood absolutely ruled incorrectly in favor of Defendant Oakwood Hospital with the precise expert that Defendants Gennaoui and Associated Physicians were also seeking to disqualify, Plaintiff's argument that Oakwood has preserved the issue, but claiming that Defendants Gennaoui and Associated Physicians have not, would mean that the laws of gravity would be suspended for Judge Youngblood's ruling

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to these Co-Defendants who are identically vested with the same interests in disqualifying Gabriel that the other Co-Defendants inexorably asserted. Plaintiff's contentions that the issue is not preserved should be rejected out-of-hand.

THE CONFUSION REGARDING NURSES TYRA AND QUINLAN

To create a plausible thesis that Nurse Tyra **and** Nurse Quinlan **both** attempted to hang **two** bags of Pitocin, Plaintiff is left with a portion of the medical records which notes that Nurse Quinlan recorded the hanging of the bags as if that necessarily meant that two bags of Pitocin, one by Nurse Tyra and one by Nurse Quinlan could absolutely be documented from the medical records. Not so fast.

Such a confused matrix cannot outweigh the actual testimony in this record, which eliminates any doubt whatsoever but that only **one** bag of Pitocin was administered to the patient. With respect to the "double hanging" Pitocin theory, this record is clear that no nurse would ever have competently hung two bags of Pitocin, simultaneously or with other hospital workers, because of the differing colored labels that would have alerted all the rest of the nurses and other observers to such an overdose. (153a). In that there are two nurses involved in the hanging of the Pitocin, they would not be able to hang two bags by "double hanging" (153a). As Nurse Schmidt testified, it was not physically possible for two bags to be hung at the same time. Nurses are required to use a single IVAC machine because it has a

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single pump from which there is a single channel so that it is not physically possible for two bags of Pitocin or any other drug to be put together as was claimed by Plaintiff. (162a).

To the extent that the medical records could be read to indicate that Nurse Quinlan had registered the administration of Pitocin, this was not necessarily, by any means, an agreement that both Nurse Quinlan **and** Nurse Tyra had hung the bags together. This was obviously the recordation of Nurse Tyra's administration through a single IVAC pump to be placed in the D5 Lactated Ringer Solution. Inasmuch as there was no other Pitocin order ever administered by Dr. Gennaoui, there is no basis for a belief whatsoever that any other nurse "double hung" another redundant bag of Pitocin (154a-160a). To the extent that Plaintiff has repeatedly read the medical records to indicate that Nurse Quinlan **and** Nurse Tyra had hung two bags, there is no record basis for this belief. On the basis of the orders and the nurses' notes, it cannot appear on this record that the patient got more Pitocin than was ordered. (126a). On the contrary, a review of the records reveals no indication whatsoever that the two nurses both had started separate ampules of Pitocin in this case. (138a).

Dr. Gennaoui testified that all of the Pitocin doses given the patient were administered in a timely and routine fashion. (120a). Dr. Gennaoui confirmed the testimony of Plaintiff's own expert, Dr. Gatewood, that the Pitocin here was given in normal

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intervals as proven by the charting itself. (120a). Dr. Gatewood, the Plaintiff's **obstetrical** expert, specifically agreed that Pitocin was given in normal intervals by the charting and this appropriate dosage was reconfirmed by Dr. Gennaoui. (120a). Dr. Gennaoui was able to say with 100% absolute certainty that there was only one label of Pitocin given to the patient (118a). Dr. Gennaoui was absolutely certain that on the day of delivery, July 16, 1980, at 6:00 p.m., all Pitocin was shut off, as this was done by him personally. (Medical Records, page M22; 109a - 110a).

Any attempt by Plaintiff's counsel to confuse the recordation by Nurse Quinlan of what had been administered pursuant to Dr. Gennaoui's orders by Nurse Tyra is simply an attempt to manufacture a "fact" when none clearly exists in the record. At most, Plaintiff has established that Nurse Quinlan was recording the single dosage of Pitocin, whether administered by Nurse Tyra or by someone else, and there is utterly no record basis for the belief that there was an over-dosage of Pitocin here. Dr. Gatewood's attempts to confuse the medical records were subject to repeated defense objections by all counsel. (Oakwood Appendix 169a; 179a-187a).

Plaintiff's Appendix (15b), which indicates that Karen Quinlan, R.N., signed off on Elias Gennaoui's Pitocin order only designates her recordation. It does not mean that both Nurse Tyra and Nurse Quinlan gave an overdose of the drug, only that

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the single dosage was signed off on by Nurse Quinlan. The positive testimony throughout the trial was that only one dosage of Pitocin was ever given to the patient.

Dr. Gatewood, Plaintiff's only obstetrical expert, agreed, (Oakwood Appendix 22a):

> "Doctor, based upon the IV records, simply based on the numbers alone, Pitocin's dosage which are running there would be within normal limits, correct?
>
> A: That's correct".

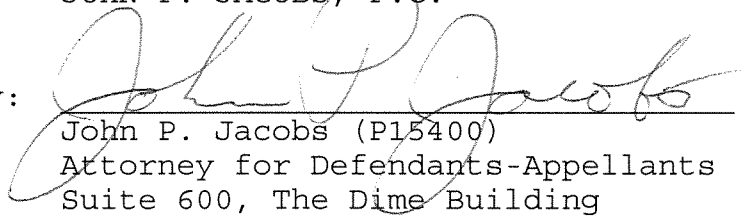
Thus, the tempest in the teapot between Nurse Tyra and Nurse Quinlan was resolved by Plaintiff's own expert.

RELIEF

WHEREFORE Defendants-Appellants Elias Gennaoui, M.D. and Associated Physicians P.C. pray that this Court grant Judgment Notwithstanding the Verdict on Appeal, or in the alternative, remand this case to the Wayne County Circuit Court for a new trial as to all parties and all issues, together with costs of the appeal.

Respectfully submitted,

JOHN P. JACOBS, P.C.

By: 

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